THE OCEAN AS A PUBLIC TRUST RESOURCE

Few places on earth are as completely public as the open ocean. The sea is no one's private property; rather, it is a commons that belongs to all the people, through ownership by the respective coastal States extending three (nautical) miles from shore. While many are aware that the territorial waters of Massachusetts are actually state property, it is less well known that such property is impressed with a higher order of stewardship responsibility than is generally the case with publicly owned buildings or land. Our ocean is thus a uniquely protected resource, and the Commonwealth has a powerful legal tool at its disposal to keep it so – the Public Trust Doctrine.

As ancient as western civilization itself, the Public Trust Doctrine is thought to originate in the second century writings of a Roman jurist who codified the pronouncements of Greek philosophers, much of which in turn was codified into Roman civil law by the Emperor Justinian circa 530 AD. Thus the *Institutes of Justinian* came to include the following passage at Book II, c.1, s.1:

> "Et quidem naturali jure communia sunt omnium haec, aer, aqua profundus, et mare et per hoc littora maris". [By natural law itself these things are the common property of all: air, running water, the sea, and with it the shores of the sea.]

Roman civil law influenced the jurisprudence of many European nations and particularly the common (i.e., judge-made) law of England after the Magna Carta. The English courts of that era firmly embraced the notion that while the Crown generally had complete powers of ownership over the realm, any lands lying seaward of the high tide mark were an exception: such lands, the so-called "tidelands", were held *in trust* for the common benefit of the public, for commerce, fishing, and other activities in which all citizens were free to engage. This same doctrine was brought to the American colonies, passed on to the thirteen original states after the Revolution, and ultimately inherited by every coastal state as it came into the Union (subject to the powers delegated to the federal government by the US Constitution). Today, the centuries-old principle of sovereign ownership of tidelands subject to a public trust is generally acknowledged to be among the most important and far-reaching in American coastal law.

Two key factors lend credence to this assertion. First, through its ownership of *public property rights* between the high tide mark and the three-mile limit, each coastal state has far greater latitude in protecting societal interests than is generally the case for dry land, most of which is private property over which government control is based only on the "police power" to protect public health, safety, and general welfare. Second, American courts for over three centuries now have reiterated that in navigable waters the *trust,* as the word implies, is so solemn an obligation of government that it cannot be divested, even as title to the soil below might be conveyed to private parties in certain circumstances. As the United States Supreme Court put it, in the landmark case of *Illinois Central R.R. Co. v. Illinois (1892):* "…the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private

parties….than it can abdicate it[s] police powers in the administration of government and the preservation of peace".

Over the years a number of other landmark cases, in both federal and state courts, have made it clear that the "trust" to which the doctrine refers is a real trust in the legal sense of the word. It has all the key elements of a binding instrument, as described in Putting the Public Trust Doctrine to Work (2nd Ed.), a major treatise on the subject prepared in 1997 by the Coastal States Organization (CSO):

> There are trust assets, generally in the form of navigable waters, the lands beneath these waters, the living resources therein, and the public property interests in these trust assets. The trust has a clear and definite beneficiary: the public, which includes not just present generations but those to come. There are trustees: the State Legislatures, which often delegate their trust powers and duties to State coastal commissions, land commissions, or similar state agencies, as well as municipalities. These trustees have a duty to protect the trust. There is a clear purpose for the trust: to preserve and continuously assure the public's ability to fully use and enjoy public trust lands, waters and resources for certain public uses.

The CSO treatise further points out that although a common core of principles exists, each state has the authority to uphold the public trust in a manner consistent with its own views of justice and policy. As a result, "…there is really no single Public Trust Doctrine; rather, there are over fifty different applications of the doctrine, one for each State, Territory or Commonwealth, as well as the federal government".

Here in Massachusetts, the Public Trust Doctrine has had a profound influence on our law of the seashore, beginning with the Colonial Ordinances of 1641-1647.[1] In that early legislation, the Massachusetts Bay Colony decided to encourage construction of wharves for maritime commerce by giving shorefront property owners a blanket grant of title to the adjoining "flats", the strip of tidelands lying between the high and low tide marks (but only to a maximum width of 100 "rods", about 1650 feet, from the high tide mark). That decision converted Massachusetts into a so-called "low water" state, the first of five that would eventually choose to move the seaward boundary of private littoral property from the high to the low water mark. Mindful of their duty as trustees, however, the colonial legislators specifically reserved for the public the right to continue using the intertidal area for three activities in which the livelihood of virtually every inhabitant depended – *fishing, fowling, and navigation.*[2] In expressly retaining state ownership of

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[1] For a recent and authoritative review of public trust law pertaining to Massachusetts waterways, see John A. Pike, "Waterways and Wetlands", Real Estate Title Practice in Massachusetts, chapter 15 of a 2-volume set published by Massachusetts Continuing Legal Education, Inc. (2003).

[2] Note that the reserved easement also covers the "natural derivatives" of the public rights of fishing, fowling, and navigation, in particular the right to pass freely over any intertidal areas in order to exercise these reserved public rights. Further details on the scope of public rights in the intertidal zone are provided in a pamphlet published by the Massachusetts Attorney General entitled "Public Rights/Private Property: Answers to Frequently Asked Questions on Beach Access".

these all-important property rights, the 1641-47 enactment became the first statute in the nation to codify the Public Trust Doctrine, albeit to a limited extent.

It is important to realize that the Colonial Ordinances did not in any way change the legal status of submerged lands, i.e. the tidelands lying seaward of the low water mark. Such offshore areas continued to be state property and the rights held in trust for the public remained undiminished, as they generally are today -- the entire "bundle of sticks" associated with ownership in fee simple absolute (subject only to the paramount authority of the federal government to regulate certain maritime activities pursuant to the Commerce Clause of the US Constitution). This was affirmed almost a century ago by the state Supreme Judicial Court (SJC) which, in the case of *Home for Aged Women v. Commonwealth (1909)*, stated that "it would be too strict a doctrine to hold that the trust for the public, under which the State holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes *all necessary and proper uses, in the interest of the public* (*emphasis added*)". Simply put, the scope of the trust in state-owned ocean resources is as broad as the public interest itself.[3]

More than 200 years passed before Massachusetts reached its next major milestone in the evolution of public trust law. In this period, stewardship of tidelands was characterized primarily by two activities: passage of additional "wharfing statutes" allowing individual upland proprietors to place fill and/or construct piers on submerged lands, subject to appropriate conditions and compensation for any property interest granted; and occasional court rulings to clarify the extent of residual public rights *vis-à-vis* private prerogatives under these enactments (read together with the Colonial Ordinances). By the turn of the 19th century, of course, the heyday of shipping had arrived and with it an explosion of waterfront development in all the major ports of the Commonwealth – so much so that legislative attention to water-borne commerce began to shift from facilitation to regulation. This commenced in 1837 with the imposition of statutory "harbor lines" to prevent undue encroachment of fill and structures into the waters of Boston Harbor, a process later extended to all major harbors after being upheld – even as it applied to building within privately owned flats – by the SJC in the famous case of *Commonwealth v. Alger (1851).*

Fifteen years later, with the boom in waterfront development continuing, the legislature decided that it could no longer handle the volume and complexity of requests for permission to build on tidelands, nor deal effectively with increasing levels of unauthorized construction. This led to the passage of Chapter 149 of the Acts of 1866, codified as Chapter 91 of the Massachusetts General Laws and later dubbed the Public Waterfront Act. The first of its kind in the nation, this statute officially delegated the bulk of responsibility for day-to-day stewardship of all tidelands (as well as Great Ponds and

[3] In particular it seems clear that conservation of natural marine resources is a trust-protected interest, in view of Article 97 of the Massachusetts Constitution that articulates "the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment".

non–tidal waterways covered by the Public Trust Doctrine) to the agency the legislature had previously created to draw harbor lines -- the Board of Harbor Commissioners. Thus began the era of waterways regulation *outside* the halls of the State House, by the executive branch of Massachusetts government rather than the legislative branch.

Apart from effecting a general transfer of decision authority, M.G.L. c.91 included two interesting provisions that emphasized the *gravitas* of the public trust. First, the statute indicated that the legislature would continue to exercise sole authority to approve two types of development likely to infringe most significantly on public navigation rights: piers and other structures extending beyond a statutory harbor line, and the first fixed-span bridge upstream of the mouth of a waterway. Second, the statute required that any license issued for work in submerged lands owned by the Commonwealth must carry the signature of the Governor – a practice that lives on to this very day, after nearly 140 years in which approximately 20,000 waterways licenses have been issued by a variety of successor agencies.

In the years following World War II this licensing program almost came to an unexpected end, due to a dispute with the federal government over whether the states were indeed the owners of submerged lands and thus the ultimate trustees of the public's rights therein. The dispute was triggered in 1945, when President Truman asserted to the world that the United States had exclusive jurisdiction over seabed minerals and other resources of the continental shelf. Federal officials interpreted the Truman Proclamation as a claim not only of sovereignty against foreign nations but also of title against the individual states, effectively placing into federal hands what the states had been managing for two centuries. A legal challenge to this proclamation by the state of California was rejected by the U.S Supreme Court, and in 1950 the Court affirmed in a series of other cases that the federal government, not the individual states, owned and controlled a significant expanse of submerged lands and ocean waters. The dispute persisted, however, with the states turning to the U.S. Congress to resolve the matter. In 1953 Congress decided, with the agreement of newly-elected President Eisenhower, to avert the possibility of interminable litigation by passing the Submerged Lands Act to restore state ownership in submerged lands out to three miles.

The latest chapter in Massachusetts story of tidelands stewardship began to unfold in the late 1970s. General concern for coastal issues had increased greatly throughout the decade, culminating in 1978 with the formal establishment of the state Coastal Zone Management (CZM) Program that included, among other things, three key initiatives affecting use of the ocean. These were:

* the first-time promulgation of written regulations to guide further Chapter 91 licensing and permitting by (what is now) the Department of Environmental Protection (DEP);

* adoption of similarly-new regulations by (what is now) the Department of Conservation and Recreation (DCR) to implement the 1970 Ocean Sanctuaries

Act (M.G.L. c.132A), which mandated preservation of the ecology and appearance of five specific areas of the Massachusetts territorial sea [4]; and

* adoption of extensive revisions to the DEP regulations implementing the Wetlands Protection Act (M.G.L. c 131, s.40) in coastal resource areas, including specific performance standards governing activities in Land Under the Ocean.

Taken together, this initial group of state regulations established at least a strong foundation for more coherent management of ocean uses, both near and far from shore.

Very soon thereafter, the Public Trust Doctrine was further elaborated in a momentous decision by the SJC in the so-called Lewis Wharf case, *Boston Waterfront Development Corp. v. Commonwealth (1979).* Here, the court was presented with the question of whether the public trust was terminated in law when tidelands were buried in fact as a result of authorized filling – which had been the universal assumption for the past two centuries. The court's definitive answer was that the public's property rights in formerly submerged tidelands are not so easily extinguished. After an extensive review of prior case law, the court declared that even though the legislative grant in question was 150 years old, it was still impressed with an "implied condition subsequent" that the property continue to be used for a public purpose.[5] These words ushered in a new era in tidelands regulation, marked by three milestone events:

* in 1981 the *Boston Waterfront* ruling was followed by another groundbreaking analysis in *Opinion of the Justices to the Senate*, in which the court expanded on the obligations of tideland stewardship in stating that any transfer or relinquishment of property rights held by the Commonwealth was subject to a rigorous five-part test – a test that it was evident few if any of the old "wharfing statutes" could satisfy;

* in 1984, jurisdiction of the waterways regulation program "came ashore" when the legislature amended Chapter 91 to require licensing of any new (or previously unauthorized) change of use or structural alteration on filled tidelands, with heightened scrutiny mandated for nonwater-dependent projects; and

* in 1990, DEP completed a comprehensive overhaul of its waterways regulations to more effectively promote water-dependent uses and associated public access, when licensing projects on both filled and flowed tidelands.

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[4] Note that the Ocean Sanctuaries Act did not establish an additional approval process. Rather, it called for the modification of existing applicable permitting programs, acting in consultation with DCR, to incorporate the prohibitions and standards of the law. Thus, as a practical matter, the waterways regulation program that implements Chapter 91 is the principal vehicle for implementing the OSA as well.

[5] As stated even more eloquently in a landmark public trust case decided by another state Supreme Court: "That generations of trustees have slept on public rights does not foreclose their successors from awakening". *Arizona Center for Law in the Public Interest v. Hassell (1991).*

Thus, in the course of a single decade Massachusetts had put in place a comprehensive scheme for controlling near-shore development, and in doing so had remained at the national forefront of progressive law-making based upon the Public Trust Doctrine.

But what of the "great watery expanse" above the tidelands lying farther offshore? In this domain very little has changed in the substance of Chapter 91 regulation in the last thirty years or even since the 1800s, simply because proposals for major construction, unattached to land, have been few and far between. Rather, the focus of ocean stewardship has been on developing a separate branch of public trust law and regulation to control fishing, shipping, and other traditional forms of water-borne commerce that are "mobile" in nature (in contrast to "stationary" uses and structures within the purview of Chapter 91). A prime example in this regard has been the efforts of the Department of Marine Fisheries, charged by M.G.L c. 130 with responsibility for protecting and preserving the living marine resources of the Commonwealth (especially commercial and recreational finfish and shellfish).

Yet times are changing, and offshore areas are increasingly being seen not only as a highway of commerce but also as prime building space, for facilities ranging from wind farms and aquaculture pens, to pipelines and communication cables, and to emerging technologies that desalinate tidewater, harness wave energy, and otherwise seek to meet basic societal needs.[6] These new development proposals have exposed a major gap in our current management framework, which relies on traditional regulatory tools that are purely reactive and do not afford a means of planning for the disposition and use of the public's ocean assets. For example, the Chapter 91 regulations generally exclude nonwater-dependent development from open waters, but water-dependent projects are eligible for licensing without further differentiation on the basis of type, size, location, environmental impacts, or other relevant parameters; and even prohibited nonwater-dependent projects can seek a variance if necessary to accommodate an "overriding municipal, regional, state, or federal interest". In Ocean Sanctuaries the bar for allowable uses is set a bit higher, in that a (very) short list of activities is categorically prohibited by the statute itself. Beyond this, however, virtually everything is allowable subject to a demonstration of "public convenience and necessity" – a test that has yet to be defined in more specific or transparent terms and, as a consequence, has seldom operated as a tool to help the state, developers, and the public recognize in advance what types of project are generally appropriate.

In terms of performance standards to be applied on a case-by-case basis, the roster of Chapter 91/OSA provisions addressing offshore impacts is equally thin. Projects may not significantly interfere with public rights of navigation and fishing (which, interestingly, includes "the right to protect habitat and nutrient source areas in order to

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[6] Among the more futuristic uses of the ocean being contemplated is that of directly counteracting global warming, as reported in a recent news item: "…the scientists backed more way-out systems for reflecting the sun's rays back into space. Plan A would float thousands of bubble-making machines across the world's oceans to send huge amounts of salt spray into the atmosphere. The trillions of tiny droplets would make the clouds bigger, whiter, and more reflective – enough, in theory, to shut down several decades worth of global warming". See "Scientists Use Creativity to Fight Global Warming", Boston Globe, p. C1 (January 20, 2004).

have fish, fowl, and marine plants available to be sought and taken"), and the standard is elaborated somewhat by specific restrictions. For example, projects are proscribed from extending into existing channels so as to impede free passage or impair sight lines required for safe navigation; also prohibited is the elimination of a traditional fishing or fowling location used extensively by the public. Beyond this, however, little or no guidance is available on the mitigation of other potential adverse effects, such as those that might substantially alter the ecology or appearance of an Ocean Sanctuary. Although preventing such alteration is the stated intent of the Ocean Sanctuaries Act, no performance standards or criteria have been promulgated as yet to implement this mandate.

Accordingly, the next chapter in the codification of the Public Trust Doctrine has yet to be written. As concluded by the Task Force, this chapter should focus on the need for coherent planning as the key to improved, ecosystem-based management of ocean resources. This challenge that can be met if tidelands trust principles are applied in productive combination with the resource management tools we have developed in the past, through experience with parklands and other natural resource areas in government ownership. The time of opportunity to extend this longstanding tradition of effective stewardship is at hand.